

Appeal No. 2001-01

Matthew Chesser, Deputy Attorney General, for the Agency

A hearing was held before the Environmental Appeals Board on January 27, 2004, pursuant to the appeal of the Broadkill River Association, Inc. ("the Association") from the decision of the Wetlands and Subaqueous Lands Section ("WSLS") of the Department of Natural Resources and Environmental Control ("DNREC or "the agency") denying the Association's permit application to construct a boat ramp, a floating dock, and dredge 300 cubic yards of material in and adjacent to Deep Hole Creek, Broadkill Beach, Delaware.<sup>1</sup>

### **ARGUMENTS OF THE PARTIES**

The appellant, Broadkill River Association, Inc. ("the Association"), contends that the agency did not consider the overall environmental aspects of its application. They looked only at the boat ramp and "marsh island", and did not consider certain key statutory and regulatory provisions dealing with wetlands and subaqueous lands. There was a boat ramp built at this site in 1969. This was done prior to the adoption in July, 1969 of regulations relating to wetlands and subaqueous lands. The channel for the front of the ramp was also deepened at that time. The agency did not take into consideration the grandfathering provisions of these statutes.

In the purpose section of the wetlands statute (7 Del. C. § 6602), regulations were adopted in accordance with the historic rights of private land owners. The agency should also have considered this boat ramp to be a pre-existing use. In the definitions section of the statute (7 Del. C. § 6603) subsection (f) defines a pre-existing use as any use of land

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<sup>1</sup> The Board's deliberations on this matter were conducted on February 24, 2004 subsequent to a hearing on another, unrelated, matter.

or a structure in existence prior to, and in active use, on July 17, 1973. This boat ramp was in active use during the relative time period in 1973 and the 12 month period preceding it. Also at issue is whether this area is a wetland (as defined by 7 Del. C. § 6603(h)), because the dredging is to take place below mean low water elevation. As part of the application was to maintain and repair the boat ramp, the dredging should have been considered maintenance dredging as defined by 7 Del. C. § 7202(g). Here, there was a channel created, and all appellants want to do is to return it to full operational condition. In addition the permit requirement of 7 Del. C. § 7205 does not apply to repairs or replacement above mean low tide.

In addition to the historic uses, Dr. Maurmeyer will testify that the statutory exceptions apply. Mr. Nawrocki, a hydrologist, and Dr. Gingrich, an entomologist, will testify as to the broader environmental impacts. Mr. Nawrocki will testify that the increase in size of "marsh island" is due to a man-made affect of upstream damming. Dr. Gingrich will testify that "marsh island" is only a breeding ground for mosquitoes and not a true part of the food chain. Also, in mitigation, the agency should have taken into consideration the increased use of the upstream habitat by wild fowl as a result of the damming. The floating boat dock should be permitted as an enhancement of the pre-existing channel.

It is the agency's contention that this permit application is for the private use of a private group. They intend to destroy pristine wetlands. There may have been a pre-existing use at one time, but it has since become unusable. It has grown in, and the "channel" is really a ditch. Accretion is occurring--the land is taking back the area. The Association has lost its grandfathered use. The ramp originally intended to access Deep

Hole Creek and not the ditch. It is not clear where the private land and public land end, and there are several claims to the land. In addition, even pre-existing uses require a permit. The floating dock is an addition. There are other boat ramps in the area the appellant can use. The accretion is due to the natural ebb and flow of the waterway--not just in this location. Even if they were man-made (i.e., created by hand--no accretion), they would still be regulated by the agency.

### **SUMMARY OF THE EVIDENCE**

#### **A. Appellant's Case**

- 1) The Board considered the testimony of Dr. Evelyn Maurmeyer.

Dr. Maurmeyer testified that she submitted the Association's June 2000 application. In January of 1997, she presented an earlier application to the agency for an upstream site to create a new ramp, walkway and dock that would have impacted vegetation. The agency suggested finding another site--specifically the one with the existing boat ramp. The only concern with the dredging was that there might be oyster beds. On June 30, 1998, the appellant purchased the alternate site. In addition to the ramp, the lot was larger and would have parking.

Dr. Maurmeyer testified that In August 1999, she was contacted by the Association to prepare the new application. She took measurements and photographs. The waterway was 16 feet wide at low tide and navigable. There was one foot of water at mean low tide. She put in the application (it was submitted in 2000) for the repair and replacement of the existing structure, the construction of a 3 x 10 foot courtesy pier at the end of the walkway,

and 300 cubic yards of maintenance dredging--at the end of the ramp and at the end of the confluence with Deep Hole Creek where a shoal had formed. In reference to Figure 8(b) (Agency's Exhibit 1), the witness testified that she measured (at mean low water) a 16-foot channel width and the dredging would be at a 12-foot width. The dredging would increase the mean low water depth to 3 feet to restore navigable water depth to pre-existing levels.

The witness further testified that two months after the application was submitted, a site visit was conducted due to the concerns of the adjacent property owners. In attendance was Charles McNally of the WSLS of DNREC, the Army Corps of Engineers ("ACE") representative, the Keens (representing the Association) and two adjacent property owners, Mrs. Hillings and Mrs. Heatwold. The Association agreed to relocate the boat ramp 5 feet from the existing location--so it would be 10 feet from the property line. In September, 2000, she revised the application to show the changed boat ramp. The permit was denied on January 2, 2001. There was no public hearing on the application, and the agency did not seek further information other than what it requested after the site visit.

The witness testified that the denial of the permit was problematic for several reasons. The Association purchased the lot based upon the agency's recommendation. The site had been used as a boat ramp since the 1960's. The hydraulic alterations occurred as a result of damming in the Prime Hook Wildlife Refuge ("Refuge"). The creek had been dredged previously. None of the public comments were sent to her or the appellants. It was never determined whether the comments were meritorious, and if so, whether a public hearing should have been held. The permit was denied in part due to the

aesthetic appeal of the area. She feels that structures and vessels improve the aesthetic appeal. The alternative launch sites are not reasonable as they are 11 and 15 miles away respectively. They are also upstream of the boat site and would cause more congestion in these areas. These were not wetlands: the area is below mean low tide and contains no macrophytic vegetation typical of a wetland. The agency did not consider this to be maintenance dredging, and it did not consider part 2 of section 3.5 of the State Wetlands Regulations regarding the maintenance of the navigability of a waterway.

On cross examination, Dr. Maurmeyer testified that Delaware Coastal Management Program denied the consistency determination for this project. Without it, the ACE would not issue its permit. Her photographs were taken at low tide. She agreed that the agency photographs (of the channel) taken in 2003 show considerable siltation (compared with her 1999 photos). The witness agreed that the channel is not navigable at low tide, but it probably would be navigable with a small craft at high tide. The permit does not place any limits on boat size, and therefore, a 25' Grady White could be launched at this site. There is also no limitation in the permit to access to the ramp. The witness did not recall whether there was any designation of parking or a turn around area in the permit application. There are wetlands on the property. The denial letter also contained references to the boat ramp being overgrown and vegetated with spartina, but that was not the case at the time the application was submitted. If granted, there is no control over what the applicants could do with the property. It would be incumbent upon the members to put limitations on access and parking. In her experience, it could be made a condition of the permit.

The witness further testified on cross-examination that given the difference between

the 1999 and 2003 photographs, continued siltation will occur. There is nothing in the application for rip rap or bank stabilization. The dredging would not cause slumping as the dredging would be 12 feet in width. It would cause slumping in 2003, but not in 1999 when the application was submitted. People typically trailer boats distances. The floating dock would be a courtesy dock so that the boat could be held until the trailer is parked. This did not exist at the time of the construction of the ramp, but it is minimal, only 3 X 10 foot. It is possible that the boat traffic in this area could also increase due to the access.

On questioning by the Board, the witness testified that it is optional for the agency to submit comments to the applicant. She did not request copies of the comments, but she did not know comments had been received. In the summer, 2000, the ramp was accessible. Dredging would be better than disturbing the channel with props (prop-washing). It would also benefit the wetlands by having further tidal flushing through the area. Prop washing is prohibited, but it would be a detrimental impact. Dredging is discouraged in pristine waterways, but in previously dredged waterways, it was not considered detrimental to do maintenance dredging. The dredging was done prior to the agency requiring permits for dredging. At Roosevelt Inlet the mean tide range is 4 ½ feet. Upstream it decreases to 2 ½ to 3 feet. Had the permit been issued in 2000, subsequent maintenance dredging would have been required. She used a john-boat in August of 1999 and launched it then.

On re-direct examination, Dr. Maurmeyer testified that in 1969, she is not sure if a federal permit was required to dredge.

2) The Board considered the testimony of Dottie Beauregard..

Ms. Beauregard testified that she resides in Davidsonville, Maryland, and Broadkill Beach. She has owned property at Broadkill since 1971. The ramp was built in 1969, and it was advertised in the developer's 1971 brochure. The appellant formed the Association in 1996 because the old ramp was filling in. In the fall of 1996, a meeting was held to locate alternative locations for a ramp. The Association continued with the process and had Dr. Maurmeyer prepare the application. They formed a corporation once expenses became more than just nominal. In the mid-1980's the Association asked the developers if they would improve the ramp and were told they would not. The witness used the boat ramp in 1973 with a john-boat. They used it into the 1970's. There was no marsh island at that time. At that time, there was an active channel along the ramp. This ramp was used by the residents of Broadkill Beach. The ramp went down to the high tide mark. They stopped using the ramp when they started looking for a site.

The witness testified that she measured the distances to the alternative launch sites. The Lewes ramp is a 13.2 miles distance--each way. From Steamboat Landing it is 14 miles round-trip and costs \$50 per year. Oyster Rocks is not a ramp: just the end of a road. It is 9.5 miles away. There is no way to get from the Refuge launch site to the Delaware Bay.

On cross examination, Ms. Beauregard testified that they acquired the boat ramp property in 1998 after suing the landowners. They sued because part of the deal for purchasing a lot in Broadkill Beach was to be able to use the ramp. Back in the 1980's one of the owners refused to maintain the ramp. In 1996, Sam Burke (one of the owners) attempted to stop the residents from using the ramp by putting snow fencing across the



property. She has used Sharp's ramp, and it could be about 5.5 miles driving distance. The Lewes option has traffic lights at the intersections, but the Steamboat Landing and Sharp's have no such traffic lights. Since 1996 they have been trailering the boat to Steamboat Landing or Sharp's without incident. She is not familiar with Smith's Landing. There is a public Landing at Slaughter's Beach, but it is a long haul. The Milton public landing is 11 miles each way. She is not aware of whether there was any dredging done in connection with the French's or the other docks.

3) The Board considered the testimony of William Sharp.

Mr. Sharp testified that his business is W. Paynter Sharp and Sons, Inc. He is the first of the sons. His company put in the road and ramp at Broadkill in the spring of 1969. They finished the ramp in the middle of the summer of 1969. He does not recall getting cited for the dredging. The dredging occurred in front of the ramp.

On cross examination, Mr. Sharp testified that his company was cited for dredging without a permit in July, 1998 in this same area. They requested the property owners to obtain the permits.

On examination by the Board, Mr. Sharp testified that they were "just cleaning the ramp off" and not removing wetlands. He does not consider it to be wetlands if there is concrete under it.

4) The Board considered the testimony of Michael Nawrocki.

Mr. Nawrocki testified that he is a hydrologist. He reviewed the package supplied at the hearing to get background on the permit application. The witness testified that he conducted an environmental study focusing on hydrology of the changes occurring near

the boat ramp and Deep Hole Creek. Based upon the aerial photos and the dates of the structures (dams) upstream, he determined there is a direct correlation between the installation of the structures and the siltation downstream. There will always be some siltation, but here it was dramatic. It was a direct correlation. He conducted some flow numbers--from the Refuge records from 1997 and determined that the dams caused the depletion of water flowing in the channel of 4,300 gallons per minute during the winter months. It decreases the water flow downstream needed to keep the channel flushed. Without the flushing, there is increased siltation. Dredging is necessary to maintain the navigability of the waterway. The refuge reports show that 3,300 acres of habitat is created upstream. It more than mitigates the dredging to be done at the boat ramp.

On cross examination, Mr. Nawrocki testified that there was no marsh island in 1973 (based upon DNREC's 1973 aerial photo of the area), but there is an area of water at the point. There is a change in the 1979 photo showing the beginning formation of marsh island. This was two years before the structures were installed. The formation of marsh island continues into 1988, 1992 and 2002. The damming increased the process: but for the damming, it would not appear as it does today. He was provided the dates of the aerial photos and the structures upstream. Rivers bend and morph without structures upstream. Part of the changes here are natural, but part is due to the structures upstream. He looked at the width of Deep Hole Creek, but it was hard to make a definitive conclusion. Theoretically, if the stream was morphing, he would expect more siltation on the other side. The damming slows some sedimentation, but it also decreases the flushing of the localized sedimentation. He did not do a computer model of the water flows.

On examination by the Board, the witness testified that the recent bulk of the marsh island is due to the man-made structures upstream. He can't tell whether the bulk of the water is from other sources. All he had were the numbers of the restricted water flow. He based this upon the limitation of 4,300 gallons per minute. This is three times what is normally necessary for the flushing of this type of stream. September through April are the major storm event months, and this is the time of restriction. Thereafter, the flow is slowly increased.

5) The Board considered the testimony of Dr. Jack Gingrich.

Dr. Gingrich testified that he is a medical entomologist at University of Delaware. He is a resident of Broadkill Beach and a member of the Association. He conducted a study of the marsh island. He did a study of flies and biting insects over a nine-month period. He did landing collections and sweeping collections. He examined the findings under a microscope. He wanted to see what fauna are present. He was looking at mosquitoes for vectors of West Nile virus and for this appeal. He does not believe the analysis was affected by his membership in the Association. He also looked for crab populations and bird species on marsh island--the biology of the island in general. There were species of crabs living in the mud flats. He saw little evidence of anything living on the island other than a dowitcher. Birds would feed on the spartina seeds, but all the birds with the exception of the dowitcher were transient.

On *voir dire*, the witness testified that his background is where various fauna live and the area of the habitat. He does not have any specific expertise with regard to dredging. He has no expertise on the effects of boating on the habitat of these species.

He does look at turbidity as a function of his studies on mosquitoes.

On further direct examination, the witness testified that the amount of mud flat area has increased and continues to increase. It is providing habitat for what are commonly referred to as no-see-ums, non-biting midges, stable flies and several species of mosquitoes (not present now) that will occur if silting continues. If the area of the mud flats is decreased by flushing, then millions of the insects will never be produced. The re-introduction of water in the area, benefits the people living within a close proximity of the mud flats. It benefits those who would like to sit on their porches and not in their air-conditioned homes. He estimated the square footage of the marsh island as 5300 square feet as of one year ago. As there were 12,600,000 square feet in the estuary, marsh island would constitute 43/10,000ths of one percent of the total area. If water flow is not re-introduced, there are two species of mosquito's that will breed--one which is a vector of West Nile virus.

On cross-examination, Dr. Gingrich testified that his boat is an old 18-foot Cobia. His observations of the marsh island occurred during the mornings, and not at any other time of the day. Dusk is an important time to observe. He did not do an exhaustive investigation--only when he had time. Insect and biting fly incidents tend to be local. If the ditch continues to fill in, and it becomes marsh, then there will be flooding and salt water mosquitoes. This is a phenomenon all around the area, but presently you do not have the localized effect.

On examination by the Board, the witness testified that the salt marsh mosquitoes have the longest flight range. With a westerly wind, the effect of marsh island with regard

to this species would be negligible.

6) The Board considered the testimony of Jackie Keen.

Ms. Keen testified that she calculated the distances from Sharps and Steamboat Landing using the maps and a computer program called "ArcView". The closest is 5 miles each way from the Association's boat ramp to the closest ramp. This adds 11 miles by boat to get to Roosevelt Landing. There are 24 members in the Association. They may allow other residents of Broadkill to use the ramp. Since 1973 they have used the ramp. Her husband and sons have been able to angle their boat into the channel. The last time they used the ramp with their main boat was in 1997. They have had a john-boat in since.

On cross examination, Ms. Keen testified that she did not calculate the distance from Oyster Rocks. Oyster Rocks is used by john-boats mostly. The Milton Landing is much further. So is Slaughter Beach. They have used a 22-foot boat on this channel. She admits that she might have to back the boat out onto the other property.

7) The Board considered the testimony of Mr. Robert Conte.

Mr. Conte testified that he used the boat ramp continually with his friends= boats from 1970 up to the mid-to-late 1970's. He used the ramp with his own boat from 1983 to 1989. From 1989 to 2002 he used it with his 18-foot canoe. The boat in the 1982 photograph was 17-feet long.

On cross-examination, Mr. Conte testified that he last used the ramp with a power boat in 1989.

B. Agency's case

8) The Board considered the testimony of Jim Chaconas.

Mr. Chaconas testified that he has been an employee of DNREC as an environmental scientist in the WSLs for 10 years. He has a B.S. in soil science from the University of Maryland. He reviewed the Association's application. He wrote the memorandum upon which the denial was based. At the time he reviewed the application, the boat ramp was filled in and covered with sediment. It was overgrown with spartina, marsh grass, and had a significant population of fiddler crabs. The dredging would remove approximately 1,680 square feet of tidal wetlands. It would create a wall 5 ½ to 6 feet high-- a steep embankment that will collapse under its own weight once dredged. The witness testified that he does not see how the Association could dredge this channel and maintain it in the dimensions indicated in the permit application. The dredging would affect the wetlands on each side. It would slump back and take some time for the channel to reach some sort of equilibrium. The channel would fill in.

The witness further testified that the application contained no consideration for parking. It would not be practical for launching a large boat. Doing so would cause damage to the banks and there would be maneuverability problems. There are alternative launching sites at Sharp's, Lewes, and Oyster Rocks. U.S. Fish & Wildlife Service supported the denial of the permit. (Agency Exhibit 2). The Fish and Wildlife Service was not represented in the application as an adjacent property owner. Consequently, they were not asked for comment at the time of the application. The Fish and Wildlife Service consider their property to run from the center line of Deep Hole Creek to the mouth of the Broadkill River. There was also a Delaware Coastal Management Program consistency determination denial for the dredging and rehabilitation of the ramp. As a result, the

Association will not be able to get an ACE permit for the project.

The witness further testified that he did a site evaluation as part of the application review. He observed that the ramp was covered over with silt. The condition as of that site evaluation approximates what is represented by his 2001 photographs. It is a short boat ride to the homes on Broadkill Beach from Oyster Rocks (about 1 mile) and he considers Oyster Rocks to be a useable boat ramp. In Agency Exhibit 10 (a photograph), the shovel shows the amount of sedimentation over the ramp. The ramp extends another 10 feet from that point out toward the creek. The channel represented in the 2003 photographs is where the dredging would occur--to the south. If the channel is dredged out to 3 feet deep, it will cause slumping. The dredging ratio should be three feet in width for every one foot in depth. Presently, it is not navigable at low tide and it is marginal at high tide. In the 1973 photograph, there is no marsh island. In 1979, the beginning of marsh island is seen, and the area south of marsh island is filled in and is no longer an island. This photograph was taken prior to the damming.

The witness testified that when a stream is over-wide, it tends to fill in to reach uniform length. The sediment drops out as the stream speed decreases. The marsh island will continue to fill in.

On cross-examination, the witness testified that he did a site evaluation shortly after the Association's application was delivered to the office. He made observations at the site, and he had been there before in 1998 when a contractor had cleaned off the ramp. He confirmed Mr. Sharp's right to clean off the boat ramp. He allowed that because it was a pre-existing structure and Mr. Sharp was maintaining it. He would not say it was

"grandfathered". The boat ramp is not as close to the channel as shown in Dr. Maurmeyer's application. He did not contact Dr. Maurmeyer to let her know there were contradictions in her application. He did not take specific measurements of mean high and mean low water levels. He made observations. He did not do calculations. He made several observations of low tides. His photographs represent typical observations. The ramp could be maintained without a permit. It could be scraped clean because it was a pre-existing ramp. He would not call it a channel--it is more of a gut. The channel existed in 1979, 1988, and 1992. The channel had changed, therefore, the maintenance portion of the statute did not apply. In applying section 3.05(a)(1) of the subaqueous lands regulations, he referred to the four factors that look at environmental sensitivity. It is self-explanatory. If it has high environmental sensitivity you don't dredge.

On examination by the Board, the witness testified that the inland bays study classifies a creek less than 40 feet wide as environmentally sensitive. This is one criterion in the evaluation of whether dredging should be allowed. This creek had two criteria. The channel is a high-maintenance area, and it would have to be dredged often. In a two-year period the ramp has silted in. It would have to be dredged every couple of years.

9) The Board considered the testimony of William Moyer.

Mr. Moyer testified that he is the section manager for the WSLS. He reviewed the application and the denial in this matter. When reviewing a subaqueous lands application, his section looks at a variety of factors. They include the existing condition of the site at the time of the application. There is really no such thing as "grandfathering" in the statute. The term used is "pre-existing use". Nothing is grandfathered other than an existing



structure that needs no further action. Adding a floating dock and dredging are additions to the use and thus require a permit. The cleaning of the ramp requires a permit where the area is marked as wetlands. Mr. Chaconas probably should not have permitted the 1998 "cleaning off" of the ramp. That probably should have required a permit. The ramp shown in the 2001 pictures is not a grandfathered ramp. Wetlands are a dynamic resource. Some erode and some are created. These wetlands were mapped in 1988, and they must be protected. There was no mitigation offered in this matter. No one requested a hearing in this matter. If a hearing is requested, the comments are usually given to the applicant. The file is open to anyone. The problems with the narrow channel include prop washing. Maintenance in the subaqueous lands statute refers to public projects--not private projects. Here, a permit would be required for maintenance.

On cross-examination, the witness testified that the portion of the statute dealing with above the mean low water line deals with docking and piers and not the lay of the land. Mitigation is a factor to be considered. The upstream damming was not an issue before them in determining the application. As far as car and water pollution due to the increased travel to alternative sites, no in-depth consideration was given.

10) The Board considered the testimony of Yvonne Hillings.

Ms. Hillings testified that she has a home in Broadkill Beach that is adjacent to the boat ramp. They purchased Lot 1 on September 1, 1998. It is a buildable lot. They also own Lot 46 next to Lot 1. She came for water, peace and beauty. They were told that nothing would be built on what became the Association's lot (Lot 1A). They watched people launching small boats and canoes. With the possibility of re-opening the boat ramp

came concerns with increased traffic and the lack of parking. South Bay Shore Drive is an exceptionally narrow road and has no parking. No one in the Association lives near the boat ramp. In addition, the property line in the application is not complete. It does not show how far over the property line goes. The gut is almost completely closed in now compared to the 2003 picture, and the creek is moving away from marsh island. She had a conversation at a meeting with Mr. Holt (a member of the Association). She spoke for two hours with Mr. Holt who said it would require removing half of marsh island to maneuver the boats.

On cross-examination, the witness testified that she acquired their original lot in 1992. The boat ramp was used with canoes, kayaks, and small boats. They bought Lot 1 after the Association purchased Lot 1A for \$1.00. They filed "papers" with someone at DNREC in opposition to the application.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Based upon the record before the Board as well as the testimony presented by the parties on January 27, 2004, the Board makes the following findings of fact and conclusions of law.

1) The Association has not met its burden of proving that the agency's decision is not supported by evidence on record before the Board. As the Board will discuss below, while the ramp on the Association's Lot 1A may have constituted a pre-existing use at one time, that use was not maintained over the years and was effectively abandoned by the previous owners. In addition, the proposed dock is not a pre-existing use. In accordance

with its statutory and regulatory authority, the agency reviewed the factors set forth in 7 Del. C. § 6604 in its review of this permit application including the environmental impacts of the project on the surrounding wetlands, the public impacts and the types of supporting facilities required. Upon consideration of the evidence before the agency as well as the testimony presented before the Board at its hearing, the Board concludes that the agency's denial of the Association's permit is supported by a clear preponderance of the evidence.

2) The Association argues that the ramp is a pre-existing use and that the proposed dredging is simply "maintenance" that does not require a permit from the Agency. The Board finds that the dredging of the "gut" or "channel" leading to Deep Hole Creek ("the creek") does not constitute "maintenance" (dredging) as defined by 7 Del. C. § 7202(g). When the boat ramp was initially constructed in 1969, the only dredging that occurred was that necessary for the installation of the ramp. At that time, there was no channel or gut to be dredged as the boat ramp was on the bank of the creek and provided direct access to the creek. Subsequent to the initial installation of the boat ramp, as the so-called "marsh island" filled in the area between the boat ramp and the creek, there has been no dredging of the channel that was created. With the continued siltation and expansion of the marsh island, the channel has disappeared, and what now remains is more aptly referred to as a gut or a ditch. Eventually, it is expected that this gut will disappear and only wetlands will remain from the edge of the ramp to the creek.

Had the previous owners dredged this channel in the past, and continued to dredge it up to the transfer of title of the lot containing the ramp to the Association, then perhaps an argument could be made that the permit application constituted one for maintenance

dredging. The record, however, indicates the opposite. The previous owners did not dredge the channel, and the owner immediately preceding the Association took efforts to block access to the ramp.

Even if the Board did consider the dredging to be "maintenance", the Board does not read 7 Del. C. § 7217(b) as providing an exemption for any private party seeking to perform maintenance dredging simply because that party is pursuing a permit from the agency. The plain language of this provision applies to work performed "by" the State or "with the assistance of" the State. The State in the present case, through the agency, opposes this project. Even if the Board were to accept the Association's interpretation of this statutory provision, the agency's denial of this permit application can hardly be considered as providing "assistance". The Board, therefore, concludes that this project requires a permit and is not exempt from this requirement.

3) The Association also appears to contend that the agency's calculation of the amount of wetlands to be impacted by the dredging was arbitrary and capricious and, therefore, the permit should not have been denied. The Association bases its argument upon the testimony and documentation submitted by its expert, Dr. Maurmeyer. The evidence on this point is in dispute. Dr. Maurmeyer testified that when she took her measurements and photographs in 1999, there was one foot of water in the channel at mean low tide. In her June, 2000 application, Dr. Maurmeyer also notes the depth of the channel at mean low tide was one (1) foot (presumably based upon her prior observations). In his December 28, 2000 report, Mr. Chaconas noted from his observations (taken shortly after the submission of the June, 2000 application) that much of the channel (referred to as

a "mudflat wetland" in the report) at low tide is "fully exposed with only a few isolated pools of standing water". While Mr. Chaconas did not do any calculations of mean low tide for the site, he has observed the channel over the past several years, and the photographs he took in 2001 represent typical observations.

There is a considerable discrepancy between a channel depth of one (1) foot at mean low tide and essentially no water at mean low tide. In this instance, the Board finds the observations of Mr. Chaconas to be the more credible. Mr. Chaconas has no particular bias in making his observations as compared to Dr. Maurmeyer who is a paid expert and consultant. Mr. Chaconas' observations were also the more recent. Given the drastic changes occurring at this site in the last three years, a one-year difference between observations will be significant. In addition, not all of Dr. Maurmeyer's testimony has been accurate. As an example, the Board notes that Dr. Maurmeyer testified the channel had previously been dredged. There is no evidence of record to support this assertion. Accordingly, the Board finds Mr. Chaconas' testimony regarding the effect of the dredging on the wetlands to be the more reliable.

The Board also notes, that the Association may be making a distinction without a difference. Whether the Association is dredging wetlands or subaqueous lands still requires the agency to perform a similar environmental and impact analysis. Under either set of criteria, dredging at this site is highly discouraged and restricted. It is classified as having high environmental sensitivity.

4) The Association further contends that since the marsh island is in some fashion "man made" this fact should modify the agency's methodology in considering its

permit application. The Board finds that the damming occurring within the Prime Hook Wildlife Refuge ("the Refuge") is not significant to the issues before us. The Board finds that the marsh island would have evolved regardless of the damming in the Refuge.

The evidence indicates that the marsh island began to develop prior to the damming. The Association's expert, Mr. Nawrocki, testified on cross-examination that the 1979 photograph of the creek shows the beginning formation of the marsh island. This was two years prior to the installation of the water control devices in the Refuge. Mr. Nawrocki testified that rivers bend and morph without having structures upstream, and the changes occurring in the creek are partly natural. While the development of the marsh island may have been accelerated due to the water control devices upstream in the Refuge, the Board finds that the marsh island would have developed regardless of the installation of those devices. More significant is that the Association has not shown the Board why these federally constructed water control devices in the Refuge should affect how the state agency reviews an application for dredging submitted almost twenty years later.

5) The Board finds that the evidence supports the agency's environmental concerns. The evidence presented by the agency at the hearing indicates that the area referred to as marsh island as well as the ramp itself are covered with *Spartina alterniflora*—one of the species of flora utilized to define a wetland in 7 Del. C. § 6603(h). The agency further noted a significant population of fiddler crabs supported on marsh island and this finding was confirmed by Dr. Gingrich. While Dr. Gingrich testified that he essentially views the marsh island as primarily a habitat for breeding "no-see-ums" and

mosquitoes, he did not perform an exhaustive study, and he has a certain degree of natural bias given his membership in the Association. The Board would also note that as this area is situated on the edge of a large wetlands refuge, whatever impact this marsh island may have on the mosquito population would have to be minimal. Accordingly, the Board gave Dr. Gingrich's testimony minimal weight.

The agency further found that the dredging would cause slumping of the banks of the gut or ditch and cause further loss of wetlands vegetation. Dr. Maurmeyer agreed that slumping would occur with the existing condition of the gut or ditch. The agency found that the boat traffic on the shallow channel created by the dredging would increase turbidity of the water, increase erosion from the boat wake, and introduce more pollutants from boats and boat engines. The Association has not proven that these environmental impacts would not occur or are overstated. The Association's own witness' testimony indicates that some of these adverse environmental effects would occur.

6) In addition to the environmental impacts, the agency further considered the number and types of supporting facilities and the public impact. Parking in particular is a concern as there is limited parking for vehicles and trailers on the site. Ms. Hillings also testified that parking on this portion of the road leading to the ramp site is problematic due to the narrowness of the road. This project would be conducted in an area of pristine wetlands. It also will occur adjacent to a national wildlife refuge with potential adverse effects on those waterways and lands. The project will only benefit a very limited number of private landowners.

7) In reviewing the Association's application, the agency assessed the proximity

of the site to other public access facilities. The Association contends that some of the alternative boat launching sites are non-existent, inaccessible, inconvenient, require significant travel, require travel through dangerous intersections, and add to air pollution. In his report, Mr. Chaconas noted that there are several existing public boat ramps in the area including those at the Refuge, Oyster Point, Roosevelt Inlet or Lewes. The testimony from Ms. Beauregard is that the Lewes ramp is 13.2 miles away and Steamboat Landing is 7 miles away. Oyster Rocks is 9.5 miles away, but it is not a ramp. She testified that the Refuge ramp does not provide access to the Delaware Bay. Ms. Keene testified that Sharps is 5 miles away and takes 11 miles by boat to get to Roosevelt Landing. Mr. Chaconas testified that Oyster Rocks is only one mile by boat from the Association's site. He considers it to be a useable boat ramp.

While there is some inconvenience for the Association members to trailer their boats to alternative public launch sites, there are accessible sites within a reasonable distance. The closest are only five to seven miles away, and Oyster Rocks/Point at 9.5 miles traveling distance by road places the user within one nautical mile of the Association's site. Furthermore, according to the testimony of Ms. Hillings, no one in the Association lives near the boat ramp. This means that the Association members would have to trailer their boats at least a certain distance, albeit a shorter distance, to the Association's site in order to launch their boats. In the balance, the overall additional contribution to air pollution of the members trailering their boats to an alternative site is not outweighed by the environmental concerns addressed by the agency should the Association be permitted to dredge and utilize the site in question.



8) Finally, the Association contends that had the agency granted the permit in 2000, when the application was submitted, the conditions that later existed would not have come into play to support the denial of the permit in 2001. The testimony does not support this contention. Dr. Maurmeyer testified that she submitted the application in 2000 (it is dated June, 2000), and she agreed to modify the application in September of 2000 due to concerns from the neighbors regarding how close the ramp was to the property line. The permit was denied on January 2, 2001. The testimony of Mr. Chaconas revealed that he conducted a site evaluation soon after the permit application was submitted. He disagreed with Dr. Maurmeyer's observations. The ramp was not useable and covered with vegetation. It also was not as near the channel or gut as indicated by Dr. Maurmeyer. He testified that his 2001 photographs approximate what he observed on his site visit.

The Board does not consider the period between the submission of the application and the denial to be unreasonable. The agency is entitled to consider the facts before it up until the time it made its determination to deny the permit. The Board as well cannot ignore the current condition of the waterway, the surrounding wetlands and uplands, particularly when those changes have been dramatic over the past three or so years. Those dramatic changes since the permit was denied lend additional support to the agency's denial of the permit. Given the rapid accretion at the site since 2001, it becomes evident that had the permit been granted, the continued siltation would require continuous dredging every two years to maintain minimal navigability. The amount of activity this would create adjacent to pristine wetlands on an ongoing basis should be avoided.

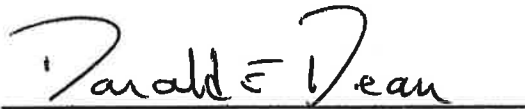
**STATEMENT OF DETERMINATION**

Based upon the foregoing reasons, the Board affirms the decision of the agency denying the Association's permit.

**SO ORDERED** this 24 th day of May, 2004.

**ENVIRONMENTAL APPEALS BOARD**

The following Board members concur in this decision.


A handwritten signature in cursive script that reads "Donald E. Dean". The signature is written in dark ink and is positioned above a horizontal line.

Donald E. Dean  
Chairman

Date: May 19, 2004


**Environmental Appeals Board**  
**Appeal No. 2001-01**

Date: May 20, 2004

  
\_\_\_\_\_  
Gordon Wood  
Board Member

**Environmental Appeals Board**  
**Appeal No. 2001-01**

Date: 23 May 2004

  
Peter McLaughlin  
Board Member